



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2005**
WAC 04 113 53127

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mark Johnson

S Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a consulting firm. It seeks to employ the beneficiary permanently in the United States as a software consultant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary of this petition and the multiple beneficiaries of other petitions filed by the petitioner the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 11, 2001. The proffered wage as stated on the Form ETA 750 is \$94,162 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of September 1999.

On the petition, the petitioner claimed to have been established on June 8, 1998, to have a gross annual income of \$1,912,613, no net annual income, and to currently employ 25 workers. In support of the petition, the petitioner has submitted its 2001 and 2002¹ Form 1120 Corporate tax returns for the petitioner and Forms W-2 wage and tax statements issued to the beneficiary. The Forms W-2 reveal the following wages: \$43,813 in 2001, \$42,600 in 2002 and \$50,145. The differences between the proffered wage and the wages actually paid to the beneficiary are \$50,358 in 2001, \$51,562 in 2002 and \$44,017. The tax returns reflect the following information for the following years:

	2001	2002
Net income ²	\$4,759	\$16,144
Current Assets	\$292,574	\$253,113
Current Liabilities	\$238,308	\$178,721

¹ While the director referenced the submission of a tax return for 2003, that document is not part of the record of proceeding, other than the amended return for that year submitted on appeal.

² Before net operating loss deduction and special deductions.

Net current assets	\$54,266	\$75,000
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In addition, counsel submitted copies of the petitioner's checking account statements for the period from May 2001 through January 2004 and the petitioner's quarterly wage reports.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage to the beneficiary and the multiple beneficiaries for whom the petitioner has also petitioned. Significantly, the director stated:

In every year the beneficiaries were paid significantly less than the proffered wage, and since the petitioner's taxable income was insufficient to demonstrate the ability to pay the full proffered wage, [Citizenship and Immigration Services] considered the petitioner's net current assets. Liquidating the petitioner's current assets to meet the proffered wage would have depleted the funds available and created more liability.

On appeal, the petitioner submits amended tax returns prepared by an independent accountant, [REDACTED] who submits a letter in support of the appeal. The amended tax returns do not increase the petitioner's net income. Rather, the petitioner is still relying on net current assets to establish an ability to pay all the beneficiaries the full proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002 or 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. We concur with the director that the petitioner's net income cannot establish its ability to pay the difference between the proffered wage and the beneficiary's actual wages in 2001, 2002 or 2003.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that

the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In his letter, submitted on appeal, Mr. [REDACTED] states that "there were errors in the preparation of the 2001-2003 tax returns." The petitioner submits copies of amended returns for those years, stamped as received by the Internal Revenue Service. On the amended returns, the petitioner has claimed the following amounts:

	2001	2002	2003
Other current assets	358,842	331,766	1,081,370
Current liabilities	66,131	57,478	462,055
Net current assets	292,711	274,308	619,315

On the amended returns, the petitioner has substantially decreased the petitioner's current liabilities and completely eliminated the "cash" line item (always a negative amount on the tax returns). In so doing, the petitioner has altered its total assets, liabilities, and shareholder equity. The new returns show many hundreds of thousands of dollars in "Mortgages, notes, bonds payable in 1 year or more," never claimed on the original returns. The accountant does not explain where this extra money came from except to make the vague and general statement that "[c]ertain items were treated incorrect [sic] from an accounting and tax perspective." The petitioner has, thus, presented two vastly different pictures of its current assets, with no documentation to show why the second version is more credible than the first. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

Mr. [REDACTED] states that the total salary due to the group of six beneficiaries was \$540,676 per year.⁴ Mr. [REDACTED] acknowledges that the total salaries actually received by the group fell short of this amount by over

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ While the director only indicated that there were six beneficiaries of petitions filed by the petitioner, we note that the petitioner has filed more than six immigrant petitions between 2001 and 2003 with all four Service Centers. In addition, the petitioner has filed numerous nonimmigrant petitions over this time. While a nonimmigrant petition need not be supported with evidence of the petitioner's ability to pay, the number of

\$200,000 per year, but he contends that the (newly recalculated) net current assets were always sufficient to make up for the shortfall. The director, in the denial notice, had observed that “[l]iquidating the petitioner’s current assets to meet the proffered wage would have depleted the funds available,” and the petitioner provides no response to this observation on appeal. Mr. [REDACTED] argument hinges on the premise that the current assets are cumulative (i.e., that they can be added together for a grand total of \$1,186,334 in current assets for the period from 2001 to 2003), but he fails to specify any flaw in the director’s previous assertion.

The petitioner admits that it substantially underpaid the beneficiaries of its recent immigrant visa petitions, even while claiming that it could have paid them the full proffered wage. The petitioner has not shown that the amended tax returns are more credible than the original returns. The petitioner has failed to submit credible evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

nonimmigrant petitions is relevant when considering an ability to pay the beneficiary of an immigrant petition.